

**Independent Contractor Study Committee**  
**Minutes: January 21, 2004**

Attendance: Riley Johnson, James Nys, Brian Smith, Nancy Butler, Jacqueline Lenmark, Larry Jones, Dave Cogley, Cary Hegreberg, Webb Brown, Carl Schweitzer, Jerry Driscoll, Larry Mayo, Jason Miller, Bob Worthington, Jerry Keck and Curt Chisolm (substituting for Byron Roberts)

Public in Attendance: Pat Murdo, John Billington, Mike Roesmann, Mike Whistler, Jason Todhunter, Darvin Eckert

Facilitator: John Andrew

Minutes: Keith Messmer

1. **Handouts:** Members were given letters which had been received since the last meeting from: Brandon Miller of Hayes Companies, Vikki Limpus Muus of Omo Construction (addressed to Jim Nys) and Jason Miller of Pacific NW Regional Council of Carpenters. Brandon Miller's letter provided additional details on how Florida handles exemptions for sole providers. The Vikki Limpus Muus' letter suggested the elimination of the IC exemptions and a requirement for all to have workers' compensation coverage. Jason Miller's letter raised questions regarding data that might be available to show the affect of non-covered workers on workers' compensation and medical rates.

Jerry Keck responded to the questions raised in Jason Miller's letter. He expressed that ERD did not have data that would answer the questions raised. Uninsured Employer's Fund data may provide some information on construction related injuries, but it would only represent a small slice of the total. Jerry will raise the questions to NCCI to see if they may have data to help answer the questions raised.

Jerry Driscoll raised a question whether the Florida Constitution provided entitlement to full legal redress.

2. **Current and Proposed Independent Contractor Unit (ICU) Processes:** Maggie Connor, Program Manager of the ICU, provided a detailed review of the processes and forms used by the program.

**IC Pamphlet:**

Carl: Suggested that language regarding working for only one business should be added.

Brian: Under a DOT lease a driver may only work for one motor carrier. May want to address this in the pamphlet as well.

Jim: Should cover by saying certain exemptions exist and direct the reader to the web site. Also may need to point out that these decisions are not going to cover your status as far as

the IRS are concerned. The last sentence in the “Who decides?” section says “binding upon other agencies” Should say “other state agencies”.

Jerry D: What happens if you are an IC without coverage?

Kevin: There is no penalty for those that are IC’s that fail to get the exemption.

Brian: The affidavit is absolutely helpful in other states.

Riley: How strictly does a negative response to 1 question affect an IC decision?

Kevin: There are 4 elements to examine to determine control. Have to look at the overall picture, but the court could find employment based on one of the elements.

Riley: Businesses don’t want to spend thousands of dollars to prove themselves right.

Jim: S corps are not addressed in the pamphlet.

Carl: If the department says someone is an IC and they are later determined not to be is there any liability to the department?

Kevin: No, protected by quasi-judicial capacity.

Jim: The decision is only conclusive at one point in time because the circumstances can change.

**Affidavit:**

Jim: #9 should say self-employment taxes rather than withholding taxes.

Curt: What business is it of the state to say how they must pay their taxes? May want to leave this point out.

Jerry K: Does IRS use our records? (Answer: No) Dept. of Revenue has started using our cross-match list.

Jacqueline: Delete tax statement from #9 as it is covered in #5.

Dave: Should change #5 to say, “ am responsible for payment of taxes” instead of “will pay”.

What is the history of not requiring documentation?

Jerry K: Requiring documentation is an inhibitor to business start-ups. Legislature reviewed whether to get rid of the exemption around the 97 session. This was a compromise.

Riley: It was a political decision. Proof up front had gone too far. It was an onerous process and the legislature wanted to do away with it all together.

Maggie: In December of 2001 the department started doing audits of the IC's.

Webb: In #3 how well do they know what to list there?

Maggie: When they talk to us we help them, otherwise they may not. We estimate that 6,000 exemptions are obtained by those who came into our office.

Webb: Should give some examples for #3.

Jason: #3 – Just because I have an exemption for 2 years doesn't mean that I am one for those 2 years. This exemption does not define the relationship for the next 2 years.

Dave: Jason's point may not lend any value or credibility to the exemption.

Jerry K: Individual meets B part of test, the exemption can't be relied upon for the A part of the test.

Carl: Does DOR use the department's info? (Answer: yes)

Jerry K: We don't know that they actually do anything with the information, do we?

Maggie: I have had their auditors call me about the information.

Carl: What if we make this DOR check known?

Dallas: Some folks don't know how to file business taxes. They report the income as wages.

Jerry K.: Maybe we should have truth in advertising and let them know we will be checking for business taxes.

Brian: Is that our goal to enforce tax laws?

Curt: An IC may not pay taxes as business was bad, but they still want to be one.

Jerry K: 7% out of 4,000 had not filed taxes.

Riley: What do you do if they haven't filed?

Maggie: This is 1 factor only. They can still establish they are an IC.

Jim: If someone misrepresents himself when seeking work, does the fine apply?

Kevin: We have not levied a fine. It is too hard to prove.

Jim: The fine could be a deterrent.

Jacqueline: The worker is not only exempt from the requirements of the Act, but also from the benefits of the Act. Should point this out in #9.

Dave: Notice to employers seems out of place on this form.

Maggie: The notice is there because employers are handing these applications out.

Jim: Applies to “work performed in Montana”. This should be in the brochure.

Carl: If work here, should be reporting taxes here.

Brian: States have reciprocal agreements for states swapping tax money.

Brian: The exemption is not viewed as helpful by other states, but the affidavit is.

Jim: Human Rights Act might be violated by #18 requirement.

Jacqueline: Strike the sentence starting with “I hope” before the IC definition on back of form.

Riley: What about education to employers?

Maggie: We will talk about that.

Jerry D.: What if they won't give their social security #?

Maggie: We have the authority to require, so they can't get the exemption without it.

Bob: How many of the exemptions are in place for one time and then drop off?

Maggie: I don't know for sure.

Jim: If you shortened the time limit for the exemption, would that help?

Maggie: We will talk about that later.

Carl: How do you educate someone to do it right when they want to abuse it?

Jerry D.: Do they not understand it or do they just not want to comply?

Maggie: We see it all. Please review the forms at your leisure and get us any additional comments you may have.

Jerry D: Employers want to exert more control than the law allows because they are paying for it. Should be more specific in part “A” about what you can’t do.

Kevin: It is not black and white so it is hard to give specific examples. You can exert the control necessary to achieve the end result.

**Proposal: Only certify that the applicant has met part B of the test, since you can’t verify “free from control” before hand.**

Jim: Auditors find differently in using their view of the requirements. They don’t honor the IC exemption. Why do the review when the employer can verify part B easily themselves?

Curt: It doesn’t matter if you do the review, employers want the certainty. Don’t want to have to worry about it.

Riley: What use is it to the employer if only B guaranteed?

Dave: If only “B” is verified it is not worth it.

Riley: It would be confusing to folks.

**Proposal: Mandate independent contractor education.**

Curt: \$17 is not enough for the exemption. Maybe pay \$250 and give the department enough money to enforce. Put fear into those who are cheating.

Carl: Putting pressure on the IC’s when the employer is the one putting the control on?

Riley: A \$250 charge would never fly. Legislators are afraid of the heavy hand of government.

**Proposal: Provisional Certificate.**

Riley: What is the value of a provisional certificate. You need to make the certificate worth something.

Brian: Have to control the Supreme Court as well.

Jerry K: To verify part A could require documentation whenever the IC is working for someone, but this would be a very onerous process.

Jim: 45 other states have nothing.

Jason: Require contractor registration for all construction workers.

Jerry D.: How many cases have found IC? Are we going to rewrite the whole law for a couple of cases?

Kevin: Very few cases have found IC relationship in the Supreme Court.

Larry J.: Solheim in 84 found IC. The number of cases is not a good barometer of the problem. The decisions affect the insurer and employer and affects the mod factor.

### **Proposal: Memorandum of Agreement**

Jerry K.: If we are unable to guaranty the certainty of part A. We were looking for something to help with the education and thought a model “memo of agreement” might help.

John: The applicant would get the memo and if they took the effort to review the relationship it could be helpful. It would be a tool.

Brian: It would work until someone gets injured.

Jim: Make it in the form of an affidavit, but in language a person can understand.

Riley: Very good tool to educate employer. The legitimate person is going to read and abide by it. Give more substance to the certificate itself.

### **Larry Jones presented his draft of Conclusive Proof Legislation:**

Provided members with a copy of the Mathews brief, which had been given to the Supreme Court. In Wild case there was no discussion of conclusive presumption, which has been upheld in the Yellowstone case. The legal authority to have a presumption is in the brief. The Supreme Court did not find the presumption to be unconstitutional. This draft would rewrite statute to repeal the Supreme Court decision and recreate the conclusive presumption. The court created law. Larson’s Treatise is relied upon by the court when it is to their advantage. If this language had been in place, Wild would not have received benefits.

Jerry D.: Why would anyone buy insurance if the conclusive proof were in place?

Larry J.: Employers need conclusivity.

Dave: The Building Industry Association met and reviewed this. Members see fraud, but they also want certainty. The piece of paper adds to the fraud. Certainty in process is almost assisting in the fraud.

Larry J.: If not voluntary, if it is coerced can be overturned. (Gonzalez case)

Jerry D.: Why would you ever have an employee? Anyone in business almost forced to use IC’s.

Larry J.: Loyalty is valued. If an employee is skilled you want to retain him. There is a mutual advantage to employer/employee relationship.

Nancy: In the last meeting we heard that Montana has a larger percentage of IC's then other states have. Why is that?

Jerry K.: About 8% of Montana's workforce is an IC. Florida is the next highest at 1.8%

Nancy: From the # of IC's compared to other states, can we conclude we have a problem?

Larry J.: Have to come to a policy decision to bring the process to an end.

Curt: Is there some screening tool that would end fraud, be in between conclusive and nothing?

Larry J.: The IC application is not only done under duress.

Jason: Can you be an employee when you have an IC?

Larry J.: Yes, look at relationship intent. Employer should have something in file that employee is working as an IC while working for that employer.

Carey: Raise the bar for the threshold of the determination and members would like Larry's language. The fact of Wild is that it is too easy to get the exemption.

Larry J.: The legislature could require some additional department review but what would keep the relationship from changing.

Jerry K.: It was a political decision that drove the process in the first place. Maybe in light of Wild that atmosphere has changed.

Riley: Bring in proof in 2 to 6 month trial.

Jerry K.: Education and if support, documentation. Provisional for new ones.

Bob: Does this not address Driscoll's concerns because the employer changed the relationship then could find employment.

Larry J.: Employer would not have to review the relationship.

Jerry D.: If employer starts putting on conditions of control still can't be employee? Does not have to meet IC definition, just have to have the exemption?

Larry: That would be the effect.

Jerry D.: Then in that case, just repeal the IC definition and exemption.

Larry: No, common law would still find an employee relationship.

Kevin: Modification to the waiver section was well done. By creating an opt in/opt out provision, must be a knowing, voluntary waiver. If individual gets hurt employer no longer has the exclusive remedy protection. Employer needs to be careful.

John: Person could still appeal based on not knowing what they were doing.

Kevin: Could take it one step further and make it a voluntary system.

Larry J.: Lots of personal liability suits, voluntary is a terrible system.

**Kevin Braun presented his draft of Rebuttable Presumption:**

Under this provision you are presumed to be an IC unless the IC can prove otherwise. Suggestions received prior to the meeting from Dave to separate public policy amendment into a new section and from George Wood to put in 401 instead of in the public policy section. Thought about adjusting waiver language, but not sure it would help if court wanted to find otherwise.

Larry: Presumption uses the AB test. Only changes who goes first.

Kevin: Yes, who has the burden of proof is shifted.

Brian: Doesn't add much to current situation.

Kevin: Currently, if worker can show that wages were paid, then burden of persuasion falls on employer to prove not an employee.

Dave: The important aspect of Kevin's bill is the presumption of employment status doesn't exist if the IC is in place.

Riley: Then they can sue for civil damage because the wc is gone.

Kevin: Yes, but must prove negligence. A preponderance of evidence is required by this bill to prove you are an employee.

Brian: You can change the amount of evidence required.

Jerry D.: A scintilla of evidence would be better for the worker.

Jim: Clients say why do we care? What requires A part of the test?

Kevin: Court would then define what it means to be in business.

Brian: If you have conclusive, don't need A and B.

Riley: Not addressing employer that skirts the law.

**Jerry Driscoll then presented his draft legislation:**

If you can meet the AB test and get the exemption and continue to comply with A & B then you are an IC. Wild maintained he was an IC, and then claimed to be an employee. The \$1,000 fine needs to be enforced.

Jacqueline: Should move 1(c) to 2.

Dave: The problem with c where it is at is it is impossible to get started in business.

Jerry D: Can move this requirement to a different section. The IC name implies construction; need to change the name as well.

Maggie: About 56% of IC's are in construction.

Kevin: Supreme Court said you didn't need to have the certificate to be presumptive. Before that it was a black and white world. Nice for litigation. Part C was removed because some were caught unaware of the consequences.

Larry: Page 9 should change applicant to IC, if at all time the "IC", shouldn't this be "employer".

Jerry D: Both parties are responsible.'

Carl: How does an IC control "A"?

Jerry D: If hiring agent says be here by 8, IC says no I will have it done by Friday.

Carey: What if the homeowner hires individual to work on house thinking person has an IC?

Kevin: You are not in the business, so have no wc liability.

Jacqueline: Homeowner policy would be called into question and there would be discussion about whether the homeowner's policy would cover. Probably wouldn't. You would be sued.

**A list of Other Ideas that were brought up at the last meeting was handed out for discussion.**

Jason: With health insurance costs rising and some of this being driven by uninsured folks, universal wc coverage in construction makes sense.

Riley: Can you get it through the legislature?

Jason: In light of the health insurance problems, I think it can be compelling.

Riley: May put injuries on health insurance or other insurance.

Carey: Isn't that the case that it causes rates to rise?

Riley: But the legislature is going to ask for proof.

Jason: Proof is not available, but it just makes sense.

Jacqueline: If no wc policy, health insurance policy should pay for it.

Jerry D: The Blues ask, "Is this work related?" If it is the Blues deny.

Jason: I will try to get data from the Blues. Construction is such a significant risk. It varies for others.

Dave: Can you require one group to get coverage, is that legal?

Jerry D: You do it by public policy.

Carey: Differentiation could be difficult. Construction requires truck driver, trees felled etc. Is that construction or ?

Curt: Should disband this committee and leave it to the legislature.

Dave: IC's will show up at the legislature if not heard here.

Jim: Florida is going toward A test only, away from B. Corporations and LLC's only.

Webb: I will talk to my counterpart in Florida.

Jacqueline: Is there consensus in the group. Should there be an IC exemption at all? Should MT recognize IC status? The legislature would say yes is my guess. If that is the case then work from there.

John: We can propose ideas in written format. How do we want to decide; unanimous, majority; # of total?

Curt: The effect of \$250 on others outside of construction is unknown.

Jim: Why do we have to have a control test? Florida doesn't, just the form of business is enough to show you are in business.

Dave: I think the court looked to control, driving the statute.

Jim: Yes, but if corporation, you do not need an IC exemption.

Jerry D: Don't do anything, let Wild stand. 39-71-401 (3)(a) says "Represent to the public that they are an IC" Don't represent yourself to be an IC, represent you are a sole proprietor.

Larry: But if you get hurt, what keeps you from saying you are an employee and have to meet the AB test. Does it provide a defense to the insurer?.....No.

John: We will put together suggestions for the next meeting.

Jerry D: Do a roll call vote, 16 votes.

Riley: Use a majority with minority report.

John: If the majority agrees then it will be a recommendation?

All members present voted yes except for Carey.

#### **Public Comment:**

Mike Whistler: I called and complained about the tile work being done on the capital. An IC is good for the employer not the employees. The auditor asked questions. Are you paid as an IC or employee? The IRS has a 20-question list that should be used by the state. 2/3 of the contractors in the state are cheating and nothing is being enforced. (Kevin responded that at the time in question, determining that the IC exemption existed was as far as the auditor could go.)

Mike Roessmann: When looking for work, they will negotiate to work for me as an IC. I still require them to have wc insurance. Should not have the option to operate without wc. The wording in the affidavit is conflicting, people are genuinely confused. Those workers who are inexperienced are the most likely to get hurt. I also require liability insurance policy.

Darvin Eckert: I read the pamphlet and figured maybe my help wasn't a legit IC. Checked on the price and for 1 employee in the drywall business, it was a \$10,000 cost. I wasn't about to do it. If dangerous work, I do it. That's how I control my exposure. I need a contract with those I am working with, but it is confusing when you have an IC. I couldn't have worked on the Wingate or the Waterford under today's laws. Now I use my son or do it by myself. That eliminates me from 50% of the bids. If everyone is on the same playing field than it would be fine to have mandatory wc. I was quoted \$22.21 for drywall. Something needs to be done.

